

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SACRAMENTO MUNICIPAL UTILITY DISTRICT
P.O. Box 15830
Sacramento, CA 95852-1830

Employer

Docket Nos. 02-R2D1-1654
through 1656

**DECISION AFTER
RECONSIDERATION**

Pursuant to the authority vested in it by the California Labor Code, the Occupational Safety and Health Appeals Board (Board) issues this decision after reconsideration in response to the petition for reconsideration submitted by the Sacramento Municipal Utility District (Employer).

JURISDICTION

Employer was working on power poles located at Rogers Road and Bar Du Lane, Sacramento, California, when an employee was electrocuted and seriously injured. The Division of Occupational Safety and Health (Division) cited Employer for: one violation, classified as general, of section 2940(d) [failure to provide an observer to employee working on high-voltage line] and three violations classified as serious of sections 2940.2(a) [permitting employee to approach within two feet, one inch of unprotected high-voltage line], 2940.6(a)(1) [failure to provide and ensure use of appropriate insulating devices], and 2941(f)(1) [permitting employee to touch or work on high-voltage line without insulating devices]. The Division proposed total penalties of \$54,425.

An Administrative Law Judge (ALJ) for the Board heard Employer's appeal on March 17 and 18, 2004. The ALJ issued his decision on April 29, 2004. Although the ALJ upheld the citations, he found the penalties duplicative and assessed Employer a single \$18,000 penalty. Employer submitted a petition for reconsideration contesting the ALJ's findings regarding the existence and classification of the three violations classified as serious.

The Board took the petition under submission on July 23, 2004. The Division submitted an answer to Employer's petition.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the petition for reconsideration as well as in the Division's response to the petition. In light of all of the foregoing, we find that the ALJ's decision was proper, that the decision was based on substantial evidence in the record as a whole, and that the findings of fact support the decision. Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

DECISION AFTER RECONSIDERATION

The decision of the ALJ dated April 29, 2004 is reinstated and affirmed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 16, 2008

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STATE OF CALIFORNIA
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In the Matter of the Appeal of:

SACRAMENTO MUNICIPAL UTILITY DISTRICT
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Employer

DOCKETS 02-R2D1-1653
through 1656

DECISION

Background and Jurisdictional Information

On October 20, 2001, Brad L. Charles, a “journeyman power lineman,” was severely burned in an electrical accident. Beginning December 19, 2001, Joel Halverson, Associate Safety Engineer for the Division of Occupational Safety and Health (Division), investigated the accident at Rogers Road and Bar Du Lane, Sacramento, California, where Sacramento Municipal Utility District (hereafter “SMUD” or Employer) maintained a place of employment. On April 11, 2002, the Division cited Employer, alleging the following violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹:

<u>Citation/Item</u>	<u>Section</u>	<u>Type</u>	<u>Penalty</u>
2 [permitting employee to approach within 2 ft. of unprotected high voltage line]	2940.2(a)	Serious	\$18,000
3 [not ensuring employees had and used insulating protective equipment]	2940.6(a)(1)	Serious	\$18,000
4 [permitting employee to work on high voltage line without insulating devices]	2941(f)(1)	Serious	\$18,000
1/1 [above employee working on high voltage line without an observer]	2940(d)	General	\$425

Employer timely appealed, contesting the citations on all available grounds and asserting defenses, including the independent-employee-action defense.

The matter was heard before Manuel M. Melgoza, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California, on March 17, 2004 and March 18, 2004. Ronald E. Medeiros, Attorney, represented Employer. Christopher Grossgart, Attorney, represented the Division. The matter was submitted for Decision on April 5, 2004.

Law and Motion

Dockets 02-R2D1-1654 through 1656

At the hearing’s outset, Employer moved, without objection, to limit the scope of its appeals from Citations 2 through 4 to the existence and

¹Unless otherwise specified, all references are to sections of Title 8, Cal. Code Regs.

classifications of the alleged violations, the serious classifications, the accident-related characterizations, the proposed penalties, and Items 4, 6, 7, and 9 of its lists of defenses, and the independent-employee-action affirmative defense. The motion was granted.

The Division moved, without objection, to amend Citation 4 to substitute the word “touched” for the word “torched” in the alleged violation’s description, based on a typographical error. The motion was granted.

Docket 02-R2D1-1653

Also at the beginning of the hearing, Employer moved, without objection, to limit the scope of its appeal from Citation 1 to the alleged violation’s existence and reasonableness of the proposed penalty. The motion was granted.

All Dockets

Summary of Evidence

The allegations overlap, are inextricable, and each relate to the accident date’s events. Therefore they are summarized together. The citations allege that Employer failed to ensure that work on exposed high voltage, energized lines was done without maintaining minimum clearance distances (Citation 2), without the aid of a qualified observer (Citation 1), and without insulating protective equipment and suitable devices (Citations 3 and 4).

The events underlying the citations involve a crew of seven men. Of those, five were full-time employees of Employer – Foster Tyler (journeyman lineman), Dan Maki and Mike Testier (“grunts” or groundsmen), Eddie Torix (“hot” apprentice), and Willie Zamudio (foreman and experienced lineman). Two crew members were temporary SMUD employees – Breck Smith and Brad Charles, both journeymen power linemen hired by Employer through a referral from the local electrician’s (IBEW) union hall. The two temporary employees testified that the permanent employees voiced resentment over their presence, creating a “rift” between the two categories of employees, partially because the temporary workers received higher wages (although this disparity was partially offset by other benefits unique to regular employees) and because there was a perception that the temporary employees were somehow “taking the jobs” of the permanent workers.² The crew was supervised by Employer’s foreman,

² This is not to suggest that Employer purposely exposed workers to unsafe conditions based on the forces underlying the rift. Rather, it provides a contextual background in which the events occurred that helps explain the linemen’s conduct and omissions, as set forth more fully below.

Guillermo (“Willie”) Zamudio, a seasoned lineman himself. The accident injured one of the temporary linemen, Brad Charles.

The temporary linemen worked for different SMUD foremen on any given day. They reported each morning to a SMUD central location and learned which foremen they would be working with and what their assignments were for the day. Neither had worked under foreman Zamudio before the accident date. Neither of the temporary workers had worked with each other. The injured worker, Brad Charles, had only been working for SMUD for about two weeks. The other, Breck Smith, had worked for Employer for about 3-4 months.

There is no dispute that Charles made inadvertent contact with a 12,000 volt line while atop the old power pole. There also is no question Charles sustained serious injuries as a result. The disputes are over how and why the accident occurred, what protective devices were available, what instructions the employees received, and what Employer, through its foreman, knew before the accident happened. Citation 2 was based not only upon SMUD allegedly permitting Charles to approach the high voltage line closer than the permitted clearance distance, but also for permitting two employees to violate the clearance distance earlier in the day. The other citations relate primarily to the accident itself, which occurred in the afternoon, shortly after the crew’s lunch break.

The two temporary employees (Smith and Charles), testified on different days of the hearing, but gave generally consistent accounts of what occurred on the day of the accident. On the morning of the accident, Smith and Charles reported to the SMUD main office yard about 6:30 to 7:00 a.m. to receive their assignments for the day. Each learned they would be working for Zamudio.

The accident occurred at a country road intersection. The crew’s assignment on the day in question was to “change out” two power poles. One of the poles (with its attendant high voltage (12,000 volts or 12 kv lines), would be re-positioned by 12-20 feet because it was constantly being swiped by vehicular traffic as vehicles rounded the corner. There were electrical lines at various heights (Exhibits 4-6). At the lowest level was a low voltage telephone line. Above that was a set of high voltage power lines held in place by an 8 foot long cross-arm attached to the power pole. Above that set of lines was another set of high voltage power lines held in place by a second cross arm. The new pole was to be higher than the old one, therefore the lines from the old pole would have to be raised about another 8 feet, yet a third level.

To transfer the lines from the old to the new pole, it was necessary, at one point, to “kill” the lower set of high voltage lines (cutting off their power), but the top lines were to remain “hot.” When the crew finished moving the

lines to the new pole, and removing the old one, they were to replace a rotted pole further north of the street intersection.

Along with the rest of the crew, Smith and Charles met briefly before heading out to the job site. According to both employees, Zamudio gave instructions about what equipment had to be loaded on the trucks to take to the site, and which vehicle each person would be traveling in, and were told in general terms that they would be “changing out” two power poles. From experience, they knew this work would involve working on live conductors. And, unlike common practice regarding pole-change-out work they had done for other electrical contractors, they learned that SMUD’s preference was to have the workers perform the work by climbing poles using gaffs and belts rather than using the available “bucket trucks” that were parked in the equipment yard.

At the pre-job gathering, there was no mention of checking out protective equipment such as insulating blankets or gloves. The equipment they were asked to load up for the morning included two telephone poles, cross-arms, “hot sticks” or “shot-guns (fiberglass poles designed to handle live conductors), and insulated orange sleeves (rounded 12 kv “covers”) used to slip over wires. Insulated blankets, based on their experience working with other foremen, were checked out of the warehouse on a daily basis, under each foreman’s name. None were checked out for the day to be taken to the job site.

The workers did not learn their individual job assignments until they arrived at the site, where Zamudio conducted about a ten-minute “tailboard” meeting. The employees recalled no instructions regarding safety hazards, no discussion about clearance requirements or any clearance problems. Zamudio testified that he discussed safety issues during the morning tailboard meeting, and that it was typical for safety issues to be discussed before employees headed out to the various jobs. However, he could not recall specifically what safety issues he addressed in that meeting. He added later that he did not believe line clearance was “that much of an issue.”

During the morning tasks at the site, the crew used digging equipment to drill a hole for the new pole, and “framed” the new pole with the necessary cross-arms and electrical components. They also moved it next to the hole. Smith and an apprentice (“hot” apprentice Eddie Torix) were assigned as a team to use their climbing gear to climb the old pole, to remove some “hard-wired jumpers” (wire segments that had been clamped between the upper and the lower set of high voltage wires, as in Exhibit 6B), and to replace them with “temporary jumpers” – which are called “mechanical jumpers” or “mechs.” Some called these red-orange-colored looping wires “macks.” The existing jumpers had to be removed, and replaced by the longer, looped mechanical jumpers so that the new wires could be raised to a new elevation commensurate with the new poles.

Smith's role, as the experienced journeyman lineman of the pair, was to be the primary worker replacing the mechs. Being a "hot apprentice," Torix was present to gain experience in doing "hot work" by watching the journeyman, to be available to help the journeyman, and to act as a "second set of eyes" for the journeyman. Both would be atop the pole with their climbing gear, roughly facing each other, and at about the same height.

While Smith and Torix removed the existing jumpers from the wires near the old pole and replaced them with the mechanical jumpers ("mechs"), foreman Zamudio and another worker climbed the nearby new pole after it was installed in the ground and (using "hot sticks" to handle the clamps) raised the upper set of wires to the new pole's cross-arm to a level corresponding to an "upper connector" (labeled in Exhibit 5) above the old pole. Unlike the old pole, the wires on the new pole were covered with orange insulating sleeves to protect against live conductors. This could not be done on the old wires because the sleeves could not be slipped over the exiting clamps at that location. Only insulating blankets would have served a similar purpose.

All wires were "live." The 12,000 voltage triggered a requirement that workers not approach a set "safe work distance" of 2 feet, 1 inch. All journeymen, by their thousands of hours' apprenticeship training (and experience), knew this rule. They may approach closer to that distance only by using protective insulating blankets, appropriate insulated gloves rated for that voltage, or the "hot sticks" (as long as other body parts remained at the clearance distance).

The Division offered testimony that, during the morning maneuvers, Smith and Torix came closer to exposed energized conductors than 2 feet and 1 inch while replacing the jumpers.

Smith testified that, when he and Torix were replacing the jumpers at the old pole with the "mechs," his shoulder and arm came closer to the wires, on at least two occasions, than permitted by the "safe work distance" – the 2' 1" minimum clearance. He based his testimony on several factors. First, while conceding that he did not measure the distance, he explained that journeymen use a "rule of thumb" to estimate whether this distance is breached. By extending an arm straight out from the shoulder, they can tell if they are closer than the permitted distance if they can get close enough to touch the live part with the fingertips. Second, the cross-arms on which the wires were fastened were standard 8-foot long cross-arms, with the wires themselves being seven feet apart, on opposite sides of the pole. Working on one side of the pole (which is at the center of the cross arm), as Smith described he did, he estimated that he came well within the safe work distance while performing the morning duties. Finally, he explained that he performed the work while positioned

between the lower set of two high voltage wires, making it more likely that he would breach the distance.³

When Smith ascended the pole in the morning to perform the work, he realized, based on the pole, cross-arm and wire configurations that it would be a good idea to use an insulating blanket over the wires and the existing clamps. Although he believed that he could do the work safely due to his experience and skill, he thought the blanket would help give him a “reference point” to warn against approaching too close, and because it would serve as added protection.

So when he was atop the pole, he testified, he called down for (two) insulating blankets. While making the request, he was facing foreman Zamudio, who was on the ground at the moment facing the men atop the pole. Smith could not be sure who answered his request, but he was certain that Zamudio was within earshot, especially based on earlier communication they had exchanged shortly before the request. Someone on the ground, however, stated that they did not have any insulating blankets available.

Smith concluded that they would have to proceed with the work without the blankets. Smith explained in testimony that, having worked around several SMUD foremen, some were strict about the clearance rule and others were not. At times, some warned him to step away when he encroached the distance, and others allowed him to continue work despite seeing a breach. He knew SMUD’s written policy required adhering to the rule. During the morning “jumper” work, however, Smith recalled Zamudio facing him throughout the assignment and not once warning him that he was approaching closer than the safe work distance. Thus, although he knew about the clearance rule, he thought it was okay not to adhere to it strictly because it was apparently ok with Zamudio, and he believed his skills were adequate to avoid the hazards. He and Torix completed the work without incident.

After they replaced the old jumpers with the mechs, Zamudio assigned Smith and Charles to walk along the road, knock on the doors of the nearby residents, and inform each one that their power was going to be interrupted in the afternoon. Both did so and completed this task by the lunch hour.

After lunch, Zamudio conducted a second “tailboard” meeting. Regarding this meeting, the Division’s and Employer’s evidence sharply conflicted. Both Smith and Charles testified that Zamudio asked for a volunteer to go up to the old pole and remove the mechanical jumpers that Torix and Smith had installed earlier. Charles volunteered to do that work. Both employees also testified that Zamudio assigned Smith a “separate

³ According to the foreman’s later testimony, the lower cross-arm on which the lower set of high voltage wires was fastened, was 35-40 feet above the ground.

assignment on a separate pole.” Specifically, Smith was to go north to the second pole that was to be replaced, prepare “grounds” (copper coiled wire), then ascend that new pole to install the grounds once the power to the lower lines on the old pole was cut.

Although Charles assumed Zamudio would assign someone to go up the old pole with him, since it was typically a “two-man job” (although it was possible to do it alone), and the “hot” apprentice would likely be the second man (as in the morning task with Smith and Torix), no one was assigned to go up with him. Torix had left his climbing gear near the base of the old pole.

Charles proceeded to the old pole. While putting on his gear, Smith approached on his way to his assignment on the pole location to the north. Smith expressed concern to Charles as to why no one had been assigned to help him. He asked Charles if he felt he could do it alone. Smith explained what Zamudio had given him to do (installing grounds on the new pole). He told Charles about his earlier request to Zamudio to provide blankets, and that the request had been refused because, apparently, someone had forgotten to check out and load the blankets during the morning “check-out” and someone said it was too far (20-30 minute driving distance) to go back and get them.

Charles concluded that he could do the task alone and without the blankets. After putting on his climbing gear, he began his ascent. Smith turned and headed to his pole to the north.

Smith then walked away from Charles to his assigned pole to the north. At one point on his way there, Smith turned back toward Charles and saw him part-way up the pole, and saw Zamudio walking away from Charles in the opposite direction. Zamudio was talking into his cellular telephone.

Charles climbed the old pole until he reached the desired work level and positioned himself there. At this point, his head was even with the lower cross-arm, between the two high voltage wires. He drew a “stick figure” on Exhibit 4 to describe where he stationed himself at this point, to the right of the pole.

Charles then called down to the ground (to the “grunt”) for an 8-foot “shotgun” that he would need to disconnect the clamps on the upper “mechs”, effectively cutting the power to the lower wires. The upper connector, on which the clamps were fastened, was another 8 feet above Charles’ shoulders, and he needed to reach the top of the clamps with the shotgun. After calling down to the “grunt” assigned to fetch equipment for the lineman, Charles waited. He received the shotgun via a rope and pulley system they used for that purpose.

Charles crossed his arms and looked over to Zamudio, waiting for his signal to disconnect the upper mechs and thus cut off the power to the lower lines. Charles waited for several minutes at that spot. Positioned here, he

opined while testifying, he was already in violation of the 2'1" clearance requirement. Zamudio could plainly see that from his position and apparently saw no problem with it. Charles estimated that, in this position to the right of the pole, his shoulders and arms were about 1 foot and 6 inches away from the nearest exposed energized conductor.

While waiting at that spot, Charles could see Zamudio speaking into the cellular phone. Smith was already at the base of the pole on the north preparing his grounds from the coiled copper wire at the base of that pole. He had not yet put on his climbing gaffs.

Charles then faced Zamudio and asked him if it was ok to cut off the power. Zamudio was sitting on a turret in the boom truck facing him, and then gave him the go-ahead, both maintaining eye-to-eye contact at the moment. Once giving the go-ahead, Zamudio turned and walked away from Charles, and headed toward his pick-up truck. Several minutes had passed between the time Charles had reached the point where he "belted in" and waited for the go-ahead.

Using the "shot-gun," Charles did a "dry run" to see if he could reach the top of the clamps at the upper connector. He realized that he could not reach and remove the clamps without adjusting his position. As he repositioned himself to face the connector more directly and shifting his body to obtain more "reach," the accident happened.

No one saw the contact because no one else was on the pole with Charles or facing him when it occurred. Smith, working at the northern pole and not yet with his climbing gear, heard the sound of the arc and turned to look. He saw Charles hanging upside down from his climbing belt. Smith froze momentarily, and then started to put on his climbing gaffs to help. But then he saw that Torix, who had left his gear at the base of the Charles' pole, was heading for his climbing gear and would get there first. A moment later, Charles started to "come to" and began to attempt to descend by himself. The others cautioned against that, someone went up to help turn Charles upright and reposition his gaffs on the pole. Charles descended on his own after that, and waited for an ambulance.

In the meantime, the workers attempted to "piece together" what happened and how. During these discussions, the workers discovered that no one saw what happened at the point of contact. According to Smith's and Charles' testimonies, no one there made any remark accusing them of having been assigned to go up the pole together, or blaming them for not following such an instruction. This is contrary to what Employer representatives concluded a week or two later. And, for reasons Smith did not understand, Zamudio ordered Smith to travel with Charles in the ambulance while he and the permanent members of the crew stayed at the site.

Contrary to his protestations, Smith was informed by his superiors that their interviews indicated that the two temporary linemen had “changed the tailboard” – that they had not gone up the old pole together to disconnect the jumpers as they were supposed to under the afternoon tailboard meeting instructions. Smith was terminated, maintaining his innocence.

Charles further testified that it should have been obvious to anyone that the work he was assigned to do in the afternoon necessitated approaching live conductors with body parts closer than the 2’ 1” distance. This partly due to the 7-foot distance between the wires and the intervening pole, which left little work distance to either side of the pole. But it was also due to the fact that the upper connector was so much higher now that the lineman would have to position himself between the wires to get more leverage, making it likely that he would be within easy reach of the cross-arm wires and insulators on the closer side. Although Charles did not confirm the dangerous proximity until he made his “dry run”, he opined that the confined area appeared suspect even from the ground.

Charles did not hear the morning conversation between Smith and Zamudio when Smith asked for insulating blankets while atop the old pole. But, Charles testified, as did Smith, that he saw no insulating blankets anywhere on site that day. He would have used them for his afternoon task if they were available. Charles did not press the issue with Zamudio because he was relatively new, and was a temporary worker wanting to avoid further stress in light of the existing friction between the permanent and temporary employees. He did not want “to make waves” by repeating a request for safety equipment that another temporary worker (Smith) had already made and was turned down.

The configurations at the top of the old pole were described by several witnesses, including foreman Guillermo (Willie) Zamudio. Zamudio testified that during his 29 year tenure with Employer, he worked his way up from groundsman, to lineman and, for the last 8 years, foreman. He is now retired.

Zamudio testified that he believed there was ample clearance to perform the work without insulating blankets, using only the 8-foot long hot sticks. Thus, he did not see the need to direct the workers to use insulating blankets. According to his testimony, the cross-arm in question was 8 feet long. The outer edges of the insulators, which held down the high voltage wires on either end, were 4 inches from the cross-arm edges. The insulators on the cross-arms that held the wires were 7 feet apart (presumably because the insulators were about 2 inches wide, accounting for a total of 6 inches of distance on either end).

Joel Halverson testified that he visited the site months after the accident, and that he has substantial training and experience in electrical work, including power poles. He estimated that the pole was 12 inches in diameter. Based on his investigative experience, Halverson testified that a man's body is on average 18 inches wide. He opined, based on these dimensions, that even if the lineman's body was pressed against the pole, he would thus be violating the 2'1" clearance requirement with the opposite shoulder and arm.

Zamudio testified that the pole in question was 8 inches in diameter.

Zamudio added that, on the morning of the accident, he recalled holding a tailboard meeting with the crew, and discussing safety issues. However, "there was issues on that" (line clearances), but "there were plenty of clearances there on the buck" [cross-arm], so "there was not much issues on that."

He remembered watching Smith and the apprentice replacing the jumpers on the old pole in the morning. He did not recall seeing them violate the 2' 1" safe work distance. If he had noticed it, he would have warned them.

He denied the subject of insulating blankets being raised by Smith during the morning procedure. In fact, he added, there were insulating blankets available on site, in the "line truck." They were 3' by 3' and orange in color. He conceded that if safety devices are needed for work on the site, it is up to the foreman to make sure they are provided. He was not sure if Smith and Torix used them in their morning maneuver, but probably would have noticed them if they had been used.

Zamudio was later asked more about the blankets. He stated that he recalled seeing six insulating blankets on the site that day. He explained that anyone can sign a form and check them out of the tool room. Generally, they stay on the truck and are not turned in at the end of the day, and they are usually checked out for 3 months at a time. On the day in question, he did not know who checked them out, but "could have been me."

Later, he was asked if he ever saw the blankets out of the truck that day. He replied that he did not recall. He conceded that if Charles had used the blankets to cover the cross-arms, it would have been safer and he would not have been injured. He also conceded that bucket-trucks (trucks with aerial devices) were available for the job, and using them could have avoided coming near the safe work clearance distance. But, he opted not to take one to the site because he thought it would be unnecessary.

In response to the undersigned's questions as to specifically where on site he saw the insulating blankets, he said they were on top of the boom-truck's cab, plainly visible for all to see, and they were orange in color. Later,

he added that he did not actually see the blankets, but saw rather the plastic containers in which they were stored, which were on top of the boom-truck cab. The plastic containers were also orange.

Eddie Torix, the “hot apprentice” who accompanied Smith for the morning pole work, testified for Employer that he knew the orange insulating blankets were on site that day. However, they were not visible from outside the truck. Actually, they were stored in orange plastic tubes, out of sight, “in the belly of the line truck” *behind* the cab. There is an area there equipped with bins, with lids. That is where the containers with the blankets are normally stored. Later, Torix conceded that he did not actually see the blankets (or their containers) that day. However, he stated that Smith did not ask for blankets that day.

Torix and Zamudio also gave accounts of the accident date that differed from Smith’s and Charles’ and that differed from each others’.

Zamudio initially testified that when Smith and Torix replaced the jumpers on the old pole in the morning, he warned them that they were getting too close to the energized lines – “hey, guys, you’re getting too close, you know, watch your side, you know, your arms, something like that.” Upon follow-up questioning, he stated that he was not sure “if they got any closer than the 2-foot clearance there.” And, as to whether he actually did warn them that morning, he later testified, “No, I don’t remember.”

Regarding the afternoon tailboard meeting, Zamudio testified that he “told both of them guys . . . those two new linemen that I had . . . I told them they were gonna go up there and remove those jumpers.” He explained that after they “killed the line” by removing both jumpers, then one of them was to go to the second pole further north and install ground wires.

Torix was asked to recount the discussions in the afternoon tailboard meeting. He explained that Zamudio told Smith and Charles to go remove the jumpers from the old pole. They were to go up together. Asked on cross-examination why that particular detail (Smith and Charles going up together) was “the first thing that came out of his [Torix’s] mouth,” Torix explained that it was the first thing Zamudio said at the meeting. He acknowledged that after the accident, and after Smith was sent with Charles to the hospital, Zamudio gathered the crew and discussed the accident. He then told them what happened, mentioning to them that he told the two linemen to work together on the pole. However, Torix insisted that this was not made up after the fact. Rather, Zamudio merely confirmed what the others heard during the afternoon tailboard meeting.⁴

⁴ Torix testified that at the tailboard meeting Zamudio assigned both Smith and Charles (“they”) to install grounds on another pole (to the north), but that was to take

Regarding the morning's events, Torix did not recall anyone mentioning the need for insulating blankets. Asked if he remembered telling the Division inspector (Halverson) that Zamudio had mentioned that one of the linemen had requested blankets, Torix answered that he did not remember.

He added that, in the morning, the workers did not need insulating blankets and that Smith positioned himself "at least 3 feet or 4 feet down from the lower cross-arm." There, he would have been well clear of any energized conductors, especially using the insulated "hot sticks."

Torix testified that in the afternoon, he, Dan Maky, and Foster Tyler watched as Charles ascended the pole to disconnect the temporary jumpers. When Charles reached his destination to wait for the signal to kill the lines, Charles was positioned well below any energized power lines. At this point, Charles' "feet were right at the phone [wire], level when he belted off, . . . just below the phone cable." (See Exhibit 4, lowest visible wire).⁵ Torix added that once Charles reached that level, he stopped and folded his arms. He explained, "We figured he was waiting for Breck [Smith] to go up." Asked where Smith was when Charles was on the pole, Torix initially testified that Smith was "over just by where the old pole was . . . walking over there with his gear."

Upon later questioning by the undersigned about this moment in time, Torix gave the following testimony.

Q – When you say [Smith was] "walking over," where is he walking over to?

A – Where the, on this picture here.

Q – The middle pole on Exhibit 5?

A – Yes. We had a truck over on the other side, and he was coming from there with his tools 'cause we just laid out grounds for the middle pole on here.

Q – So he was walking toward that middle pole when you saw Mr. Charles up on top?

place after they removed the jumpers (killing the power) at the old pole. Zamudio testified that at the tailboard, he assigned Smith to install the grounds, but only after the jumpers were removed from the old pole because, once the power was cut, it would only take one person to install the grounds – thus Smith could do it *by himself*.

⁵ When Charles testified, he drew the stick figure to show where he was when he "belted off," well above the telephone wire.

A – Right.

Q – Is that the pole that was supposed to be grounded later?

A – Yes.

...

Q – At that point where you saw him [Smith] with his tools over at that middle pole, had Mr. Charles already reached his destination?

A – Yes, he reached his destination . . . Once he stopped there, [I] looked down there and seen Breck with his tools on his shoulders . . .

Q – But Mr. Smith was walking the other way, right? He was walking toward the middle pole?

A – He was coming across the street.

Q – He was not walking toward the old pole, was he?

A – No, he wasn't. He was walking towards the middle pole, which most guys do. They walk over to make sure that their layout's there.

Q – But at this point where you saw Mr. Smith going to the middle pole, you didn't wait to see if he was gonna turn around and go to the old pole?

A – No, I didn't.

...

Q – When did you next turn toward the old pole?

A – It's when I heard the crack of the electricity.

Torix went on to explain that (contrary to Zamudio's and Charles' account) Zamudio did not give Charles the "ok signal" to cut the power after he climbed the pole. Rather, he remembered Zamudio giving the ok much before that, when the two (Smith and Charles) were still on the ground, and Zamudio said, "Okay, you guys can go ahead and kill that." He did not hear Charles ask (before the signal) Zamudio if it was okay to cut the power. All he heard was Zamudio yelling across the street "at those guys" that they could go ahead and "kill it at any time."

After Charles climbed the old pole to his desired position, Torix testified that he (Torix) turned and looked away. The accident occurred after that, and he did not see the contact. Torix testified on cross-examination that he

believed Charles needed insulated blankets to do the afternoon task on the old pole.⁶

In the accident's aftermath, Torix recalled the workers stayed in the vicinity within earshot of each other. He recalled no one accusing Smith of failing to accompany Charles on the old pole.

During later cross-examination, Torix equivocated when asked whether he talked to anyone about the accident before the hearing, including on the morning of the hearing.

Zamudio testified about the events proximate to the accident. He stated that he was below Charles, about 15 feet away, when Charles started climbing the old pole. He did not wait to see him climb all the way up. Rather, as Charles was climbing, Zamudio walked to his truck to telephone SMUD dispatch "to get permission to open the line – to open the jumpers, [and] kill the line." He called dispatch and notified them that he was going to cut the power. After the notification, "I turned around and told them guys that it was okay to kill the line . . . He [Charles] was already on the pole" when he gave the signal.

Zamudio later explained that Charles had already reached his work point while waiting, and that he was "about 6 feet below the bottom [power line]." From there, he was well clear of any hazard. Zamudio claimed he never saw Charles climb further, and did not see him working between the lines (at the cross-arm).

Zamudio was again asked about what he saw when he gave the signal to cut the power. He testified that when he gave Charles the go-ahead, "I don't know if I seen the other guy [Smith] up there yet." Still later, Zamudio recalled that he did make eye contact with Charles when he gave the signal, and no one was on the pole with Charles then. After he gave the signal, Zamudio looked away and walked back toward his truck to put his cell phone away and to "plug it back in." Later, he heard the arc. He ran back over to the scene, and noticed then that Smith was on the ground and, "still he didn't even have his [climbing] hooks on."

The Division asked Zamudio if he assigned anyone to act as Charles' observer. Initially, he testified that he (Zamudio) always observes his crew because it is his job. When asked who was supposed to act as Charles observer when he was up on the pole, Zamudio testified that he (Zamudio) was the observer, but he was not his observer at that point. Zamudio was asked if he designated anyone to be an observer for the afternoon work on that pole.

⁶ Q – Do you think Mr. Charles needed the blankets?

A – Yes, I did.

Zamudio stated that he did not, explaining that that was something the two journeymen could decide on their own.⁷

Joel Halverson testified that he began his investigation by holding an opening conference with Larry Brilliant (SMUD's Manager of the Health and Safety Department), Jim Baird (Process Coordinator), and Brick Gwaltney (SMUD's Health and Safety Specialist). Among other things, they discussed the accident in general terms. During the opening conference, the representatives told him that particular safety equipment such as insulated blankets and insulated gloves were kept in the shop and had to be checked out of the shop "for each particular job."

Also, when he later interviewed Torix individually, Torix told him that one of the employees requested insulated blankets but that they were not available. Halverson also recalled that Torix said that Zamudio had made a remark that day that "they needed blankets on the lines on the old pole." Torix did not mention to Halverson that insulating blankets were available at the site.

Based on the interviews, the diagrams the workers made, and the photographs of the scene that Halverson received from Employer, he concluded that there was no way Charles could have performed the task in the afternoon without violating the 2' 1" clearance rule, and that he therefore needed protective equipment – blankets, insulated gloves, or a "bucket truck."

He conceded on cross-examination that if Employer had provided and ensured employees used insulating blankets for the pole work, he would not have issued any of the citations.

Findings and Reasons for Decision

Employer permitted employee(s) to approach exposed, high voltage energized conductors closer than the permissible clearance distances, without the aid of a qualified observer, without using insulating protective blankets, and without using other suitable devices. The Division established the alleged violations.

⁷ Q – (by ALJ) But his question was, "did you assign anyone to be an observer for the activity that Mr. Charles was going to be engaged in?"

A – No. They choose to be observers, no. They're both linemen. They can decide for themselves what they wanna be . . . One of them can hold back and watch; the other one can do the work.

The Division established the serious classification of the violations alleged in Citations 2 through 4.

Employer did not establish a valid defense, and did not prove that it lacked the knowledge requisite to reclassify the violations to general.

The Division established that the serious violations alleged in Citations 2 through 4 caused serious injury.

Employer demonstrated that a single form of abatement would have corrected the hazard, and therefore a single penalty is appropriate for all Citations.

A single penalty of \$18,000 is reasonable, and is assessed for Citation 2.

The Division has the burden of proving each element of its case by a preponderance of the evidence. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-923 et.al., DAR (Dec. 31, 1986), p. 4.)⁸

The Safety Orders the Division alleged Employer violated (in Citations 1 through 4, sequentially) state as follows.

§2940. General Provisions.

. . .

(d) Observers. During the time work is being done on any exposed conductors or exposed parts of equipment connected to high-voltage systems, a qualified electrical worker, or an employee in training, shall be in close proximity at each work location to:

(1) act primarily as an observer for the purpose of preventing an accident, and

(2) render immediate assistance in the event of an accident. Such observer will not be required in connection with work on overhead trolley distribution circuits not exceeding 1,500 volts D.C. where there is no conductor of opposite polarity less than 4 feet there from,

⁸ “DAR” and “DDAR” in this Decision refer to Appeals Board Decisions After Reconsideration and Denials of Petitions for Reconsideration, respectively.

or where such work is performed from suitable tower platforms or other similar structures.

§2940.2. Clearances.

(a) No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table 2940.2⁹ unless:

(1) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or

(2) The energized part is insulated or guarded from the employee and any other conductive object at a different potential.

§2940.6. Tools and Protective Equipment.

(a) Insulating Equipment

(1) Insulating equipment designed for the voltage levels to be encountered shall be provided and the employer shall ensure that they are used by employees as required by this section. . .

§2941. Work on or in Proximity to Overhead High Voltage Lines.

. . .

(f) Working on Conductors or Equipment Energized at 600 Volts or More.

(1) Employees shall not be permitted to touch or work on exposed energized conductors or equipment except when wearing suitable insulating gloves with protectors, or when using other suitable devices. . . [Emphasis added.]

The record plainly demonstrates that Brad Charles approached an unprotected power line energized at 12,000 volts closer than the “safe work distance” permitted by § 2940.2(a) (Citation 2). Absent a valid defense, the Division established the alleged violation.

Employer raised the independent-employee-action (IEA) affirmative defense in its pleadings, contending that Smith and Charles knowingly violated Employer’s tailboard instructions and its “buddy system” by not working on the

⁹ Table 2940.2 states that the clearance distance for the voltage involved here is 2 feet, 1 inch.

pole together and violated their training rules about not approaching within 2' 1" of the exposed line.¹⁰

The Appeals Board has long held that the IEA defense is not available to an employer where the misconduct leading to the violation is engaged in or condoned by a supervisor. The Board has explained that, even if an employer meets the five-part criterion under *Mercury Service*,

the Board does not allow the use of the defense if the offending worker is a foreperson or supervisor. . . The rationale behind this policy is that an employer must ensure that their agents in the workplace "are knowledgeable of the safety orders and are diligent in enforcing and following them. . ." [citing *Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470, DAR (May 8, 1991).]

In *Kenai Drilling Limited*, Cal/OSHA App. 00-2326, DAR (Sept. 23, 2002), the Board held that the defense is also unavailable where the employer is partly responsible for the alleged misconduct (e.g., where employer fails to carry out the mandate to promptly remove from service defective safety devices, and the employee failed to heed instructions that he should not use it [lanyard with sticky latch]). The Board explained that that Safety Order's [6580(c)] affirmative requirement to remove a lanyard from service cannot be delegated solely to the employees without taking effective measures to see that the duty to remove is carried out by them.

In another case, the Board held that an employer also cannot avail itself of the IEA defense by attempting to delegate to employees the responsibility to inspect lumber for defects, then allege that the employee was at fault for failing to carry out his job properly. (*Patent Construction Systems*, Cal/OSHA App. 97-1407, DAR (Aug. 2, 2002).) In *Great Western Drywall*, Cal/OSHA App. 90-1246, DAR (Sept. 6, 1991), the Board held that where an employee violates a safety standard in plain view of management (there a foreman and a superintendent), the employer cannot avail itself of the I.E.A. defense.¹¹

¹⁰ To avoid liability through the defense, employers must establish all the following elements: (1) the employee was experienced in the job being performed; (2) employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) employer effectively enforces the safety program; (4) employer has a policy which it enforces of sanctions against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, DAR (Oct. 16, 1980).)

¹¹ Compare *Ferro Union, Inc.*, Cal/OSHA App. 96-1445, DAR (Sept. 13, 2000) - the third and fifth elements of the IEA are not proven if Employer has a lockout policy but leaves compliance to the discretion non-management employees as to when they will

The undersigned credits Smith's and Charles' testimonies that, during the morning jumper replacement as well as during Charles' attempts to remove the jumpers, the employees violated the clearance requirements in plain view of their foreman. The foreman did nothing to stop it.¹²

Zamudio's and Torix's testimonies are not credible. Zamudio's was internally inconsistent in key areas. It is also implausible. First, he claimed that Charles positioned himself 6 feet below the lower high voltage line to disconnect the jumpers from the upper line. As Halverson testified (and Charles agreed), there is no way Charles could have performed his disconnecting work (even with an 8-foot insulated device) from that point because the upper connector that he had to reach was 7 feet above the lower cross-arm even by Zamudio's earlier testimony. If Charles was 6 feet below the lower cross-arm, he would have to reach at least 13 feet higher to reach the connector (labeled in Exhibit 5).

While testifying, Torix often hesitated and fumbled for answers when confronted with questions requesting specifics. He was at a loss to explain logical inconsistencies. Substantively, his testimony was implausible. In one instance, he testified that when Charles reached his desired work point at the old pole, Charles' feet were "just below" the telephone cable level, which is substantially lower than where other witnesses placed him. From Exhibit 4, it appears that Torix's account places Charles about one full body length below where Charles drew himself. As with Zamudio's claim, it is implausible that Charles could have reached the upper connector (even with an 8-foot shotgun) if he was at the level of the telephone wire. From there, Charles would have had to use a 14-16-foot long extension tool to reach the upper connector.

The lack of credibility in Torix's and Zamudio's testimonies effectively enhances the reliability of Smith's, Charles' and Halverson's testimonies in light of the entire record. By all accounts, the cross-arm on the pole Charles ascended was 8 feet long. The insulators near each end of the cross arm, and the high voltage wires corresponding to each, were 7 feet apart. Halverson testified that the pole's diameter (thus the space taken up between those lines) was 12 inches. Zamudio estimated the diameter at 8 inches. But even using Zamudio's estimate, this would leave only 38 inches' distance from the edge of the pole to the nearest energized conductor. Subtracting from that space Halverson's unrefuted testimony that the width of an average man's boy (and/or shoulder width) is about 18 inches, leaves a distance of only 20 inches

use it. Safety program is thus not well-devised and employee's decision not to lock out is not a "knowing violation" of Employer's safety requirement.

¹² Employer presented no evidence to refute employee witness testimony that some SMUD foremen enforce the clearance requirements strictly and others allow deviations.

from the energized wire on the end of the cross-arm. That 20 inches assumes the journeyman's shoulder is pressed up against the pole. Any shifting of the body or moving away from the pole toward the wire reduces that clearance distance.

Charles testified without refutation that the upper connector (marked in Exhibit 5) was about 8 feet higher than his shoulders when he reached the cross arm that he drew on photographic Exhibit 4. Even Zamudio conceded that the upper connector was 7 feet higher than the lower cross-arm. Thus, precisely as Charles and Halverson testified, the only way Charles could have performed the afternoon task was for him to position himself at the cross-arm, between the two lines, where even Zamudio acknowledged that there was very little clearance.

Accordingly, it should have been plain that if someone had to work anywhere near the cross-arm, there was ample reason to believe, as Charles testified, that one would have to breach the 2' 1" clearance requirement to disconnect the jumpers from the upper connector. The record therefore supports Charles' testimony that the clearance distances involved here were plainly suspect when viewed from the ground, and that when Zamudio gave him the signal to disconnect the jumpers, Zamudio was in a position to see from his vantage point that he (Charles) was closer to the nearest exposed conductor than the 2' 1" rule permitted.

The motions (shifting and repositioning) Charles described that he engaged in right before he made contact with the energized conductor on the right side of the pole are consistent with record evidence of the configurations and clearance distances at the pole's cross-arms. His testimony about the distances and about how he made contact with the live conductors is plausible and credible.

Employer faults Smith and Charles for failing to do the work as a team, thereby denying Charles the benefit of an observer who could have warned Charles if he was too close to the line or requested insulating blankets if needed. Employer's position lacks merit.

As alleged in Citation 1, § 2940(d) requires employers to provide a qualified observer for this type of work. Zamudio, after initially attempting to deny it, later conceded that he did not designate an observer. Allegedly, he gave the workers a joint assignment and delegated to them the choice of who would be the observer and who would do the actual work.

Such an arrangement does not satisfy the Safety Order's requirements. The Safety Order imposes the duty upon employers to ensure a qualified observer is placed at the scene and performs the necessary duties. That ultimate responsibility cannot be delegated. Although it may have been

acceptable for Zamudio to allow the journeymen to decide among themselves which one would fulfill that role, he (on Employer's behalf) was not relieved of the responsibility to ensure that one of them actually performed that required function.

Zamudio failed to ensure that he, or one of the journeymen, performed the observer function, despite having the opportunity. He watched Charles ascend the pole alone. After Charles reached his destination, Zamudio knew Smith was neither on the pole nor whether he even had his climbing gear on. Charles spent several minutes at the destination with no observer atop the pole with him. Rather than maintaining eye contact to make sure someone acted as an observer for Charles, Zamudio turned from Charles, then walked away.

Even Torix conceded that Smith was walking away from the old pole when Charles climbed. Consequently, no one saw Charles inadvertently contact the exposed high voltage line.

Thus, even assuming, for argument's sake, that the tailboard meeting included instructions for Smith and Charles to climb the pole together, Zamudio failed to discharge his responsibility to ensure that an observer maintained eye contact with the work, and that Charles maintained the safe work distance.

The foregoing notwithstanding, Zamudio's and Torix's testimonies about the tailboard assignments are not credible. First, they were contradictory in one respect, which casts doubt on their remaining aspects. By Torix's account, the tailboard assignment directed both journeymen to go install grounds on the northern pole after the jumpers were disconnected at the old pole. By Zamudio's account, Smith alone was given that assignment because it took only one person to do it by himself once the jumpers were disconnected. Next, no witness claimed that during the accident's immediate aftermath (when all employees at the site were trying to make sense of what happened) that anyone accused Smith of neglecting to act as Charles' observer and thus avert the accident. This accusation was first made by Zamudio after Smith was ordered away from the site, when Smith was in no position to state his defense. The record suggests that the alleged "change of the tailboard" by the two temporary linemen was an after-the-fact pretense.

Smith's and Charles' accounts are more credible. They appeared to the undersigned to be candid witnesses. In addition to admitting that they violated the clearance requirements (partly because Zamudio condoned it), they persuasively testified that Zamudio clearly gave them *separate assignments* for the afternoon, for which Smith later expressed concern to Charles. It is found, therefore, that Zamudio never clearly assigned Smith and Charles to ascend the old pole to perform the afternoon work together.

For similar credibility reasons, it is concluded that the crew did not have insulating blankets (or equivalent protection) for that work on site that day. Both Torix and Zamudio initially claimed with certainty that the blankets were on site. Zamudio even claimed to have seen them. Upon being pressed, each conceded that he did not actually see the blankets on site that day. Zamudio claimed the blanket's containers were where everyone could see them, atop a truck's cab. Torix stated that they were normally kept out of sight in the "belly" of the truck, and he did not actually see them (or their containers) that day.

Smith and Charles testified credibly that they did not see any blankets on site that day. Smith's testimony that he made a verbal request to Zamudio for insulating blankets that morning was met by less certain testimony from Zamudio that he *did not recall* the topic being raised, and by Torix's testimony that (although denying he heard Smith ask for them) he did not recall if he told the Division inspector that the foreman had actually verified that the workers asked for the blankets.

Halverson's testimony corroborated Smith's claim, and added that Torix told him that he heard from Zamudio that the blankets were requested during the crew's morning work. In addition, Employer did not refute Halverson's testimony that Employer representatives confirmed at an opening conference that insulating blankets were supposed to be checked out of the shop each day "for each job." This testimony contradicted Zamudio's, and is consistent with Charles' and Smith's testimonies that someone forgot to load the blankets on the truck during the morning "check out." The foregoing supports the conclusion that no insulating blankets were available on site that day, and that Zamudio failed to ensure such insulating equipment was used, as alleged in Citations 3 and 4.

As Zamudio conceded, and precedent shows, the duty to provide the safety equipment lies with the foreman (on behalf of Employer) and cannot be delegated.

The Division established each alleged violation.

Employer challenged the violations' serious classifications. Labor Code § 6432(a) states that a serious violation is deemed to exist if there is a substantial probability that death or serious physical harm could result from a violation. Employer does not quarrel with Division evidence that contacting an unprotected 12,000 volt line could result in serious injury to a substantial probability.

Under L.C. § 6432(b), a violation meeting the above criteria will nevertheless not be classified serious if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know the

violation's presence. Employer did not carry its burden of proving that it could not have known of each violative condition by exercising reasonable diligence. Indeed, it is Zamudio's failure to carry out his supervisory responsibilities that underlies each alleged violation. He failed to assign a designated observer and neglected to ensure that one performed that function even though he had the opportunity to do so (Zamudio saw Charles alone atop the pole, and he was there for several minutes). Zamudio failed to enforce the clearance requirements even though he had opportunities to do so during the morning and the afternoon. He neglected to ensure the availability and use of insulating blankets or other protective equipment, even though he could have learned (as Charles did), that the afternoon work plainly entailed a risk of working close to the exposed wires at the cross-arm.¹³ Employers are responsible for their foremen's misconduct. (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Board*, 167 Cal.App. 3d 1232; 213 Cal. Rptr. 806 (May 1985).) Consequently, the record supports the violations' serious classifications.

Employer contested the "accident-related" characterization of the serious violations, which is a designation affecting the penalty computations (Labor Code § 6319(d), which permits penalty reductions only for Employer size if a serious violation causes a serious injury). The Division established that Charles' serious injuries were caused by Employer's (Zamudio's) failure to ensure that he did not maintain a safe work distance from the energized lines at the conductors and/or that he covered the lines with insulated blankets (or devices affording equivalent protection) so he could safely approach. These contributing factors underlie each alleged violation. Therefore, the "accident-related" characterization is warranted.

However, the record also warrants penalty relief based on another point Employer raised – that the Division cited multiple violations, with multiple penalties, where one form of abatement (ensuring use of insulated blankets) would have abated each condition. Halverson conceded Employer's point during testimony. The Board has long held that, although the Division may cite and establish numerous violations entailing the same hazard, there is no reason to assess multiple, duplicative penalties if one abatement method would correct the condition and encourage work place safety. (See *Pace Arrow, Inc.*, Cal/OSHA App. 78-1016 et.al., DAR (Nov. 19, 1984), p. 3; *Napa Pipe Corporation*, Cal/OSHA App. 90-143, DAR (Apr. 18, 1991), p. 3; *Anresco, Inc.*, Cal/OSHA App. 90-855, DAR (Dec. 20, 1991), pp. 3-4; and *Strong Tie Structures*, Cal/OSHA App. 75-856 et.al., DAR (Sep. 16, 1976), pp. 2-4; *Color*

¹³ Even though it was not the Division's burden, it nevertheless proved that the violative conditions occurred at a time and under circumstances providing Employer (through its foreman) with a reasonable opportunity to have detected them. (*C.C. Meyers, Incorporated*, Cal/OSHA App. 95-4063, DAR (June 7, 2000); and *Sunrise Window Cleaners*, Cal/OSHA App. 00-3220 et.al., DAR (Jan. 23, 2003) – "prior indications that violations might occur" as evidence that Employer could have known.)

Specialists, Inc., Cal/OSHA App. 95-3883 et. al., DAR (June 30, 2000); and *Ontario Residential Manor*, Cal/OSHA App. 96-1260, DAR (June 30, 2000).)

Applying the foregoing principles to the case at hand, it is determined that a single penalty of \$18,000 (for Citation 2) is warranted under the circumstances and is consistent with the Act's purposes under the foregoing precedent. The other proposed penalties shall therefore be reduced to zero.

Decision

It is hereby ordered that the citations are established as indicated above and set forth in the attached Summary Table.

It is further ordered that the final penalties assessed for each citation are indicated above and set forth in the attached Summary Table.

DATED: April 29, 2004

MANUEL M. MELGOZA
Administrative Law Judge